

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

SUSIE A HARE
Claimant

APPEAL NO. 07A-UI-10522-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA CONTRACT FABRICATORS INC
Employer

**OC: 02/25/07 R: 03
Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Iowa Contract Fabricators, Inc., filed a timely appeal from the November 5, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 30, 2007. Claimant Susie Hare participated. Danielle Esser, Human Resources Generalist, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Susie Hare was employed by Iowa Contract Fabricators, Inc., as a full-time laborer from May 10, 2005 until October 15, 2007, when Plant Manager Jim Erven discharged her for attendance. The final absences that prompted the discharge occurred on October 10 and 11, 2007. On October 10, Ms. Hare left work early because she was frustrated with her work assignment. On October 11, Ms. Hare was absent from work so that she could participate in a court proceeding in which she was the criminal defendant. Before Ms. Hare departed work on October 10, she left an application for a personal day October 10 and a vacation day on October 11 with the secretary without going through the proper steps to have the absences approved by a supervisor. The employer's policy required that applications for vacation be submitted at least 48 hours in advance of the requested days.

The employer has a written attendance policy that assigns attendance points for absences. Under the attendance policy, if Ms. Hare needed to be absent, she was required to personally call a designated telephone number at least 15 minutes prior to the start of her shift.

In making the decision to discharge Ms. Hare, the employer considered the final absences and prior absences. On May 4, 2007, Mr. Hare was absent due to personal illness or to take her child to the doctor and properly reported the absence to the employer. On May 11, Ms. Hare

was tardy due to personal transportation issues. On June 6, Ms. Hare was absent because she was in jail on a criminal charge. On June 8, Ms. Hare was absent because she was in an accident and was hospitalized. Ms. Hare properly reported this absence.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The greater weight of the evidence in the record establishes that Ms. Hare's early departure on October 10 and absence on October 11 were each unexcused absences under the applicable law. The evidence established additional unexcused absences on May 11 and June 6. The other absences were excused absences under the applicable law. The administrative law judge concludes that the unexcused absences were not excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Hare was discharged for no disqualifying reason. Accordingly, Ms. Hare is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Hare.

DECISION:

The claims representative's November 5, 2007, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css